Supreme Court of the United States.

October Term 1921
No. 148.

CHARLES S. FAIRCHILD,
Appellant,

against

CHARLES E. HUGHES, as Secretary of State of the United States,

and

HARRY M. DAUGHERTY, as Attorney General of the United States.

BRIEF FOR APPELLANT.

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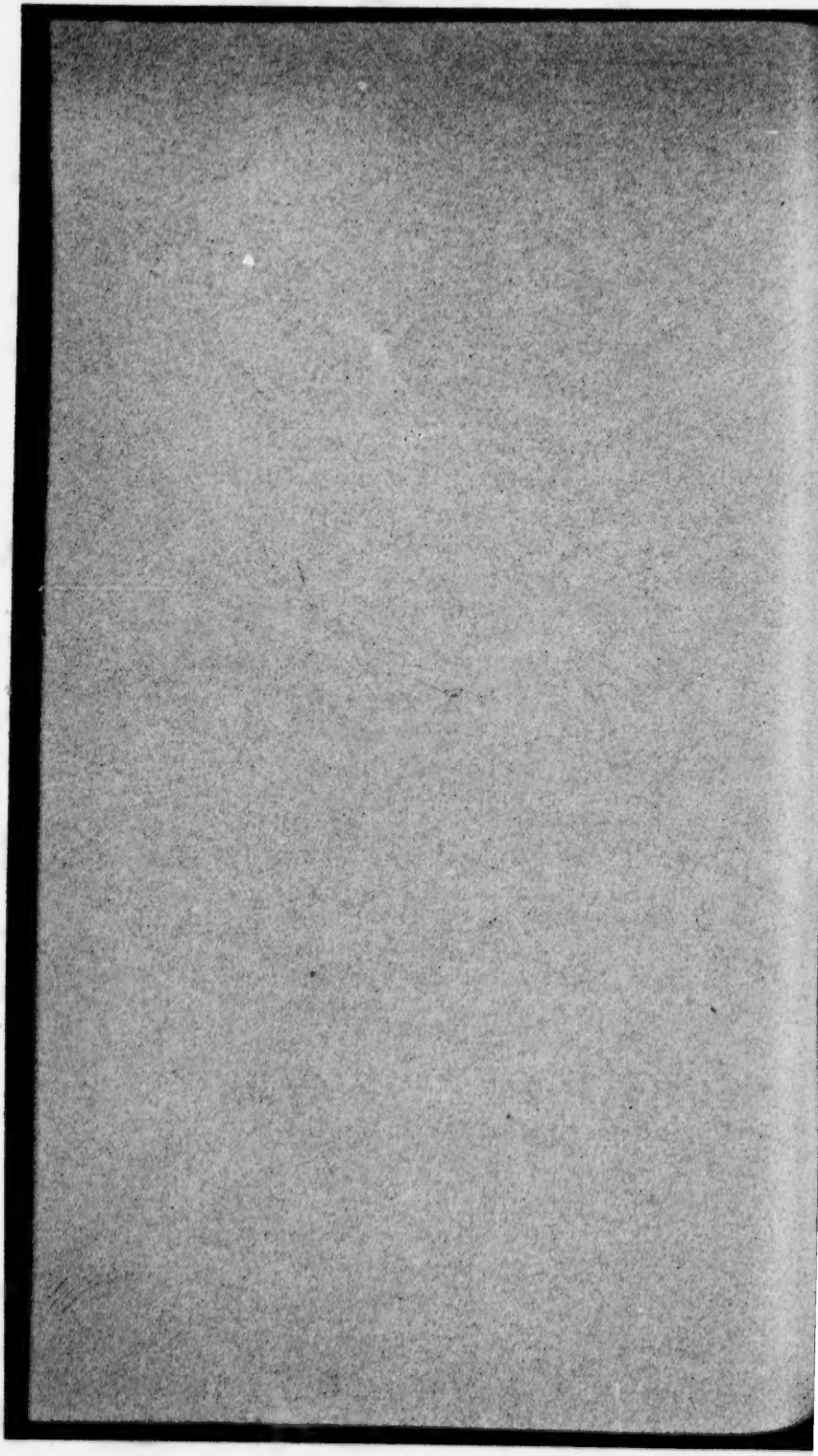

SUBJECT INDEX.

Eighth Point.

Ninth Point.

Tenth Point.

Eleventh Point.

Twelfth Point.

THIRTEENTH POINT.

INDEX OF CASES.

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APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District, which dismissed a bill to restrain the

defendant, The Secretary of State, from issuing a proclamation declaring that the so-called suffrage amendment has been ratified, or that it has become a part of the Constitution of the United States, and to restrain the defendant, the Attorney General, from enforcing said amendment. The bill was filed July 7, 1920.

The complainant is President of the American Constitutional League, which is composed of members, citizens of the United States and citizens of the following States: Arkansas, Maryland, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, Rhode Island, Virginia and West Virginia. He sues on their behalf because the number of members is so great that it is impossible to make them all parties to the suit. The question is one of common or general interest to all the members. It is based upon the following fundamental propositions:

1. The so-called amendment is not an amendment at all, but would, if adopted, work a fundamental change in our Government by taking away from the States the power to regulate the suffrage for the offices of the State Governments. It is, therefore, not within the power of amendment given by Article V. It is also in violation of the 9th and 10th Amendments to the Constitution. These amendments constitute a limit to the power of amendment given by Article V.

2. The right to regulate the suffrage is an essential part of a republican form of government guaranteed by Section 4, Article IV, of the Constitution. The amendment deprives the States of this.

3. The ratification of which a certificate had been transmitted to the Secretary of State from the States of Missouri and West Virginia is illegal and void. The ratification by the State of Tennessee since the bill was filed is also illegal and void.

4. The action of the Secretary of State in certifying the ratification of said amendment is ministerial only and so declared by him. He has no power, and so declares, to investigate the validity of any particular certificate of ratification, nor the validity of the amendment itself.

5. The rights of the members of the association, as citizens and tax payers would be irretrievably injured if such proclamation should continue in force and if the Attorney General should undertake to enforce the amendment. Such action would give rise to a multiplicity of suits. There would be no remedy in damages to the complainant and to those for whom he sues.

The references in this brief are to the original pages in the Record.

The plaintiff represents citizens of nine States. They are taxpayers in their respective States and each of them with one exception has the right to exercise the elective franchise therein.

Record, Article II, p. 2.

The facts as to the settlement of the various States, of which the parties represented by plaintiff are citizens, the Declaration of Independence in 1776, the exercise by each State of sovereign powers acknowledged by Great Britain in the Treaty of Paris September 3, 1783, are alleged in Articles III to V of the Record, pages 2-3.

The Constitution of the United States took effect by the ratification of the ninth state June 21, 1788. The ratification by the people of said States was in good faith, and with full assurance that said States and the people thereof relinquished only such portion of sovereign power as was necessary and essential for the creation and establishment of a limited national government for the purpose of, and with only the powers enumerated in the several articles of the said Constitution, and that all other powers not delegated nor prohibited to the several States were reserved to the said several States and to the sovereign people thereof. The conventions of Massachusetts, New York, Pennsylvania and Virginia ratified on condition that further declaratory and restrictive clauses should be added.

Record, Article VII, p. 4.

It would not have been ratified but for the general understanding on the part of the people of the several States that limitations of powers of the new government should be expressed in amendments, which should state the fundamental rights of the States and of the people thereof and should operate as permanent limitations upon the powers of the general government. In accordance with this understanding and in compliance with the request of the conventions the first ten amendments were adopted in 1789.

Record, Articles VII-VIII, pp. 4-5.

The ninth and tenth amendments are as follows:

"IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

"X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Arkansas and Missouri applied for admission to the Union and were admitted on the basis and faith of these amendments.

Record, Article XI, p. 6.

This is distinctly expressed in the Constitution of Missouri.

Record, Article XII, p. 6.

At the time of the filing of the Bill, the legislatures of thirty-four States had gone through the form of ratifying the Suffrage Amendment, known as the Nineteenth, and their respective Secretaries of State transmitted a certificate of such ratification to the Secretary of State of the United States.

Record, Article XIV, p. 5.

In all the States except Delaware, the Constitution of the State provides that no amendment to such Constitution shall be valid unless the same is submitted to the electors of said States for their approval at an election regularly held and as approved by them at such election.

Record, Article XVI, p. 9.

In eleven of the States which had adopted resolutions purporting to ratify said Amendment the right of citizens to vote is restricted by their several Constitutions to citizens of the male sex and the legislatures of those States have no power

under their Constitution to amend the Constitution of the State without a vote of the people of the State approving the same. In nine of them the proposition to amend the Constitution of said States so as to give women the right to vote, was submitted to the vote of the people of said States during the six years before the filing of the Bill, and was in each case defeated.

Record, Article XVII, p. 10.

In the Legislature of West Virginia a resolution to ratify the said Amendment was voted upon March 1, 1920, and was defeated. March 3, a motion to reconsider this vote was made and was defeated. Under Rule 52 of the West Virginia Senate no measure once defeated, unless reconsidered can be again acted upon during the session. Under Rule 69 of that Senate a vote of two-thirds of the Senate is required to suspend any rule. The Constitution of the State requires a two-thirds vote to expel a member. Nevertheless on the 10th day of March, 1920, the Senate of said State by a bare majority voted to unseat and expel Senator A. R. Montgomery, who was a member of the said Senate. Thereupon the said Senate, without suspending said Rule 52, attempted again to act on the said Suffrage Amendment, and passed a resolution purporting to ratify it by a vote of 15 in favor and 14 against. Said Senator Montgomery was opposed to the said resolution, and would have voted against it had he been allowed to do so. Another section of the Constitution of West Virginia provides that any Senator who removes from the county or district for which he has been elected during his term of office, loses his seat. One of the said Senators

removed from his county and district during his term, but was, nevertheless, allowed to vote on such resolution of ratification and his vote was necessary to its passage.

Record, Article XVIII, pp. 10-11.

The Constitution of Tennessee provides as follows:

"No convention or General Assembly shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States, unless such convention or General Assembly shall have been elected after such amendment has been submitted."

At the time of the filing of the Bill a special session of that legislature had been called for the purpose of ratifying said Suffrage Amendment. Said legislature was elected before the pending Amendment had been proposed by Congress. Record, Article XXX, pp. 20-21. Nevertheless as this court will take judicial notice, pending this suit, a certificate that the Legislature of Tennessee had ratified the said Amendment was sent to the Secretary of State. Such ratification was invalid and was annulled by subsequent vote. The detailed facts are proved in the case of Leser *vs.* Garnett, No. 553.

Under the laws of seven of the States of which the persons represented by plaintiff are citizens, the right to exercise the elective franchise is not conferred upon citizens of the female sex. If the said amendment should be enforced, the expense of election in those States would be nearly doubled and a heavy financial burden would be imposed upon said parties.

Record, Article XIX, p. 12.

The Secretary of State of the United States declared before the Bill was filed that he had no power to examine into the validity of any acts of ratification and that upon receiving one additional certificate of ratification he would issue a proclamation declaring that said Amendment had been ratified by a sufficient number of States, and has become part of the Constitution.

Record, Article XXIII, p. 15.

As the Court will take judicial notice he did this August 26, 1920; after the appeal in this case was perfected and with full notice of it.

Assignment of Errors.

1. The Supreme Court of the District of Columbia erred in granting the motion made by defendants to dismiss the bill filed in the cause.

2. The said Court erred in holding that the plaintiff by his bill discloses no interest or privity entitling him to maintain the same or obtain relief thereby.

3. The said Court erred in holding that there was no emergency calling for the issue of an injunction therein.

4. The said Court erred in holding that there was no limit to the power to amend the Constitution of the United States granted by the fifth article thereof.

5. The said Court erred in holding that the ninth and tenth amendments to the Constitution of the United States did not limit in any way the power

to amend granted in the fifth article of the said Constitution.

6. The said Court erred in holding that there was no limit by any implication to the power to amend granted by the fifth article of the said Constitution.

7. The said Court erred in holding that the pending Suffrage Amendment mentioned in the bill, if ratified, would not in any way violate the guarantee of the Republican form of government contained in section 4, article IV, of said Constitution.

8. The said Court erred in holding that the respective Constitutions of the States of Missouri and Tennessee, mentioned in said bill, were not binding upon the respective legislatures of the said States in any action they might take upon the submission to the States of an amendment of the Constitution of the United States, and that the said legislatures could act upon the same irrespective of any requirements or limitations imposed by the said constitutions of said States respectively.

9. The said Court erred in holding that it had no power to consider or examine the validity of any ratification by any particular legislature of an amendment proposed to the Constitution of the United States.

10. The said Court erred in holding that it had no power to consider the allegations of the bill respecting the action of the Legislature of the State of West Virginia, in respect to the ratification of said suffrage amendment.

11. The said Court erred in holding that it was competent for the majority of the States of the Union, as expressed in the fifth article of the Constitution of the United States, to impress upon the minority of the States forming a part of said Union changes in their respective Constitutions without conformity to the methods fixed by the said State Constitution for making such changes.

12. The said Court erred in holding that there was no equity in said bill.

13. The Court of Appeals erred in affirming the decree and in not rendering a decree for plaintiff.

POINTS.

FIRST.

Proclamation by Secretary of State.

1. A proclamation by the Secretary of State is official evidence to the whole country that an amendment has been ratified.

2. The Secretary disclaims power to examine the validity of any State ratification. Bill Article XXIII, pp. 14, 15.

3. If there is a defect in any such ratification, it must be shown by evidence dehors the record. This can only be done in a court of equity.

4. Courts of Equity have power to enjoin a public officer from doing a ministerial act which would be valid on its face, when the invalidity of it can be shown by extrinsic evidence. This is similar to the practice of granting an injunction against

proceedings at law when there is an equitable defense.

> Houston *v.* Ormes, 252 U. S. 469, 40 Sup. Ct. Rep. 369.
>
> Askren *v.* Continental Oil Co. Ibid 355, 252 U. S. 444.

5. A court of equity has also power to grant an injunction when the act ought to be enjoined, if unlawful will work irreparable injury. The question of its lawfulness should first be determined by a judicial tribunal.

> Western Union Telegraph Company *v.* Andrews, 216 U. S. 165.

At page 166 the Court said:

"Since the decision in the Circuit Court, this Court has decided the case of Ex parte Young, 209 U. S. 123, 155. In that case the previous cases in this court concerning the application of the Eleventh Amendment of the Constitution were fully considered, and it was then said by Mr. Justice Peckham, speaking for the court:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of Equity from such action."

Such an injunction granted by the District Court in North Carolina was affirmed in Hammer *v.* Degenhart, 247 U. S. 251.

6. In the case at bar the question whether or not a proposed article which deprives each State of the right to regulate the elective franchise for local officers is of fundamental importance, and can only be finally determined by this Court.

SECOND.

Motion to Dismiss.

The Motion to Dismiss is based on the ground that the question involved is merely a moot question. The general principle that the Court will not undertake to decide a moot question is not denied, but it has no application to the present case.

The Association represented by the plaintiff is composed of citizens and tax payers of the United States and of ten of the several States. They certainly have a direct interest in deciding whether or not the Secretary of State should continue to circulate as part of the official laws of the United States an alleged amendment to the Constitution, which is, in reality invalid. The printed book containing this proclamation is evidence in all courts; to rebut it in any particular case is obviously impracticable. The plaintiffs, therefore, adopted the direct course of challenging the right to issue the proclamation.

The objection is made that, pending the suit, the proclamation has already issued. This, however, does not apply to the action of the Attorney General which we seek to enjoin; in fact, his official action would not begin until after the proclamation.

But it does not apply to relief against the Secretary of State, though that would necessarily be varied from the relief first asked.

In the exercise of civil rights and in the performance of civil duties, it is essential that citizens of the United States should know what the Constitution is. The Secretary of State has no power to determine this. His power is ministerial only, as he declares and the bill alleges. Obviously this must be so, for he is not a judicial officer and has no power to examine the evidence as to the validity of particular ratifications; and yet his action is *prima facie* valid and its effect is continuous. In such cases the court will inquire whether or not it is valid, and if invalid, will so decree.

> *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498.

It was held that although the order under review had by its terms expired, yet the principle established by it was continuous until it was revoked or adjudged invalid; and that therefore the Court would hold the case and pass upon the original validity of the order.

The court cited with approval,

> *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308,

and

> *Boise City Co.* v. *Clark, et al., County Commrs.*, 131 Fed. 415.

In this case the Circuit Court of Appeals held that though an irrigation order by a municipal body had expired, yet the court could proceed to

pass on its validity, "partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called to act in the matter."

This rule is analogous to the decisions under the old equity maxim, *pendente lite nihil innovetur.*

Tilton v. *Cofield*, 93 U. S. 163. At p. 168 the Court say:

> "The law is that he who intermeddles with property in litigation does it at his peril and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. * * * They (the purchasers) took the chances and must abide by the result."

S. P. Heatley v. *Finster*, 2 Johns. Ch. 157.
Powell v. *Campbell*, 20 Nevada 232.

In this case plaintiff in divorce action asked to have certain specific property set apart for her use. Held that purchaser *pendente lite* was bound by decree.

S. P. Bp. Winchester *v.* Paine, 11 Ves. 199.
2 Story Eq. sec. 908 n. 3.
1 Story Eq. secs. 536, 537.

The argument apparently assumes that the object of the suit is limited to the election to be held in November, 1920. This is a mistake. If the proclamation referred to is valid and the Amendment in question has become a part of the Constitution of the United States, it will apply not only to the

National election to be held in November, but to all elections to be held in the United States for all time to come. It is essential that the people of this country should know what has and what has not become a part of the Constitution under which they live, and that election officials for all time to come should know how to regulate registration of voters and the reception of ballots.

THIRD.

Whatever Defendants Did Pendente Lite Was Subject to the Final Decree.

The defendant, the Secretary of State, had full notice of the pendency of the suit.

The bill was filed July 7th, 1920. The defendant appeared and answered the rule to show cause July 13th, 1920. The decree dismissing the bill was entered July 14th, 1920, and on the same day an appeal was noted to the Court of Appeals. The rule on this subject is stated by Mr. Justice Holmes in Wingert *v.* First National Bank, 223 U. S. 670-672:

> "No doubt after the filing of a bill for an injunction, defendants proceed at their peril, even though no injunction is issued and if they go on to inflict an actionable wrong upon the plaintiff, will not be allowed to defeat the jurisdiction of the Court by their own act."

To the same effect are,

Garden City Sand Co. v. *Fire Brick Co.*, 260 Ill. 231.

Lewis v. *North Kingstown*, 16 Rhode Island, 15.

Milkman v. *Ordway*, 106 Mass. 232, 253, declares the general rule above stated. The Court said:

> "The peculiar province of a Court of Chancery is to adapt its remedies to the circumstances of each case as developed by the trial."

FOURTH.

Limit to Amending Power.

1. There is an intrinsic limit to the power of amendment, under article V of the Constitution. It must be in harmony with the system of government created by that Constitution and not destructive of it.

Gagnon *v.* U. S. 193 U. S. 451.

At page 457, the Court said:

"The power to amend must not be confounded with the power to create."

It was held that a court could not enter judgment of naturalization, nunc pro tunc, when there was no entry or memorandum of original judgment.

John Marshall in the Virginia Constitutional Convention said (3 Elliot's Debates, p. 234):

"The difficulty we find in amending the confederation will not be found in amending this Constitution. Any amendments, in the system before you, will not go to the radical change; a plain way is pointed out for the purpose."

In like manner it is held that a statute authorizing amendment to a pleading does not authorize the introduction of a new cause of action.

Woodruff *v.* Dickie, 5 Robertson (N. Y. Superior Court) 619, 622.
Givens *v.* Wheeler, 6 Colo. 149, 151.
Lundbeck *v.* Pilmair, 78 Iowa 434, 43 N. W. 270.

2. If, therefore, it can be shown that the right of local self-government is an essential part of the Constitution, the conclusion necessarily follows that a so-called amendment destroying or essentially impairing this is invalid.

That such is the nature of our government is well settled.

Hammer *v.* Dagenhort, 247 U. S. 251 (1918).

A bill was filed in North Carolina to enjoin United States Attorney from enforcing penalty of U. S. Child Labor Law. Decree of permanent injunction sustained.

At p. 275, the Court said:

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the Federal Constitution."

In interpreting the Constitution it must never be forgotten that the nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. Lane County *v.* Oregon, 7 Wall. 71, 76. The power of the States to regulate

their purely local affairs, by such laws as seem wise to the local authority, is inherent and has never been surrendered to the general government.

Texas *v.* White, 7 Wallace 700.

At p. 725, the Court said:

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the articles of confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the constitution, though the powers of the states were much restricted, still, all powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'Without the States in union, there could be no such political body as the United States.' (Lane County *v.* Oregon, 7 Wall. 76.) Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

S. P. Keith *v.* Clark, 97 U. S. 454, Tennessee bank notes.

In Northern Securities Co. *v.* United States, 193 U. S. 197, 348, Mr. Justice Harlan, referring to

the declarations of Chief Justice Chase in Texas *v.* White, quoted above, said:

> **"These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety."**

Chief Justice White on behalf of the dissenting justices declared with equal positiveness:

> **"The powers of the Federal and State Governments, the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate." Page 369.**

South Carolina *v.* U. S., 199 U. S. 437.

At page 448, the Court said:

"We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty often times of great delicacy and difficulty."

S. P. Gibbons *v.* Ogden, 9 Wheat. 195.

"The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; *but not* to those which are completely with-

in a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

In the same case (p. 204), Chief Justice Marshall said:

"In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting powers must arise. Were it even otherwise the measure taken by the respective governments to execute their knowledge powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the power of the other."

S. P. South Covington *v.* Kentucky, 252 U. S. 399, 40 Sup. Ct. Rep. 378, 379.
New Orleans *v.* United States, 10 Peters 662.

At p. 736, the Court said:

"The State of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities. All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people."

On these points our great statesmen agree.

Well did Mr. Lincoln say in his first inaugural:

"To maintain inviolate the rights of the States to order and control under the Constitution their own affairs by their own judgment exclusively, is essential for the preservation of that balance of power on which our institutions rest."

Hamilton in the New York Convention, June 21, 1788 (Elliot's Debates, vol. II, pp. 267-8):

"Were the laws of the Union to new-model the internal policy of any state; were they to alter, or abrogate at a blow, the whole of its civil and criminal institutions; were they to penetrate the recesses of domestic life, and control in all respects, the private conduct of individuals—there might be force in the objection (to the plan of the Constitution); and the same Constitution, which was happily calculated for one state, might sacrifice the welfare of another. The blow aimed at the members must give a fatal wound to the head; and the destruction of the States must be at once a political suicide. Can the National Government be guilty of this madness?"

He spoke to the same effect: *Ibid.* 355.

Oliver Wolcott in the Connecticut Convention (Elliot's Debates, vol. II, p. 202):

"The Constitution effectually secures the states in their several rights. It must secure them for its own sake; for they are the pillars which uphold the general system."

Pierce Butler to Weedon Butler, October 8, 1787 (Ferrand's Records, vol. III, p. 103):

"The powers of the General Government are so defined as not to destroy the sovereignty of the individual States."

Pelatiah Webster, often called "the father of the Constitution," in his pamphlet entitled "The Weakness of Brutus Exposed" (Phila. 1787):

"It appears then very plain that the natural effect and tendency of the supreme power of the union is to give strength, establishment, and permanency to the internal police and jurisdiction of each of the particular States; not to melt down and destroy, but to support and confirm them all."

To the same effect is Daire; North Carolina Conv.; 4 Elliott 58.

Jefferson to William Johnson in 1823 (Ford's Writings of Jefferson, vol. VII, p. 296):

"The capital and leading object of the Constitution was to leave with the States all authorities which respected their own citizens only, and to transfer to the United States those which respected citizens of foreign or other states."

Jefferson to Madison, Feb. 8, 1786:

"With respect to everything external, we be one nation only, firmly hooked together. Internal government is what each State should keep to itself."

McCulloch *v.* Maryland, 4 Wheat 315.

At page 403, the Court said:

"No political dreamer was ever wild enough to think of breaking down the lines which separates the States, and of compounding the American people into one common mass."

4. Some State Constitutions declare the same fundamental principle.

Article 1, sec. 1 of the Constitution of Texas, adopted 1876:

"Texas is a free and independent State, subject only to the Constitution of the United States; and

the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States."

Article II, sec. 3 of the Constitution of Missouri stated in the bill (Article XII, p. 6) is to the same effect.

5. The Court and the country are in a position the converse of that of a century ago. Then it was necessary to protect the general government from the encroachments of the States. They taxed the agencies of the Federal Government as in McCulloch *v.* Maryland, 4 Wheat. 316. They taxed interstate commerce as in Gibbons *v.* Ogden, 9 Wheat. 195. They taxed foreign commerce as in The Passenger Tax Cases, 7 Howard 283.

The Court adopted the phrase of Daniel Webster, our greatest constitutional lawyer. "The power to tax involves the power to destroy." McCulloch *v.* Maryland, 4 Wheat. 316, 431. That phrase is not in the Constitution. The Court adopted it in order to preserve the life of that instrument and of the system created by it.

These decisions made us a nation. Now we are confronted by the attempt of the central government, supported by a majority of states, to break down the local self government of the States. If this succeeds we shall be no longer a federal republic. Our motto—*E pluribus unum*—will be falsified.

It is no reply that this is not completed by the pending amendment. The Bank of the United States was not taxed out of existence by the law of Maryland. Interstate commerce was not destroyed by the statute of New York. Foreign

commerce was not completely dominated by the statutes of Massachusetts and New York.

But the Court saw clearly that the right claimed, if it existed at all, might be exercised so as to accomplish all these results. It held therefore that the right claimed did not exist. The power to tax was the power to destroy.

With equal justice we now say—the power to amend by changing the State Constitutions is the power to destroy. If a majority of the States can change the qualifications for electors prescribed by the Constitution of a State against the will of the people of that State, and in a manner forbidden by the State Constitution they can in effect destroy the State altogether.

FIFTH.

Effect of Ninth and Tenth Amendments.

The ninth and tenth amendments were adopted to guard against this danger. They are fundamental and irrevocable, except by unanimous consent of all the States. They were adopted subsequent to the adoption of the Constitution. If there is anything inconsistent, these must control. But they should be construed together and so construed are harmonious.

1. The articles of the Constitution are to be interpreted according to the circumstances under which they were respectively written, and the character of the people to whom they were originally addressed.

Chief Justice Marshall thus expressed this canon in Gibbons *v.* Ogden, 9 Wheaton U. S. Rep. 1 (1824), which established the right of freedom of trade between the States of the Union:

"If from the imperfection of human language there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction" (p. 188).

South Carolina *v.* United States, 199 U. S. 437.

In this case, the court said, p. 450:

"To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."

Passenger Tax Cases, 7 Howard 283, 428. Opinion of Mr. Justice Wayne.

In this case, the Court said:

"That is a very narrow view of the constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used by the United States in such a way as to dissolve, or even disquiet, the fundamental organization of either of the States. The Constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual

recognition in it of the dissimilar institutions of the state."

S. P. Evans *v.* Gore, 253 U. S. 245, 259, 40 Sup. Ct. Rep. 550, 555.
Knowlton *v.* Moore, 178 U. S. 95, 20 Sup. Ct. 768, 44 L. Ed. 969.
Maxwell *v.* Dow, 176 U. S. 581, 602.

2. When a series of enactments are under consideration they should be construed together. This fundamental rule for the construction of statutes is thus stated by this Court.

Richardson *v.* Harmon, 222 U. S. 96, 103.

"The legislation is in pari materia with the Act of 1851 and must be read in connection with that law, and so read, should be given such an effect, not incongruous with that law, so far as consistent with the terms of the latter legislation."

An illustration of the application of this rule is to be found in the decision in the Conscription Cases.

Arver *v.* United States, 38 S. C. Rep. 159, 245 U. S. 366.

Certain persons who had been drafted to serve in the National Army contended that the Conscription Act was in violation of the Thirteenth Amendment to the Constitution of the United States:

"Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

It was argued that compulsory service in the Army was "involuntary servitude." But the court construed this amendment in connection with Subdivision 12 of Section 8, Article I, which gives the Congress power—"To raise and support armies." And the court held the conscription to be authorized by the constitutional power thus granted to Congress.

SIXTH.

Effect first ten amendments.

The first ten amendments were proposed when the adoption of the Constitution was under consideration. This was ratified with the express understanding that such amendments should be adopted as limitations upon the powers of the Federal Government and as securing the right of each State to Local Self-Government.

Mr. Justice Holmes delivering the opinion of the Court in

> New York Trust *vs.* Eisner, 41 Sup. Ct. 506-7, stated the source of authority on this subject.

"Upon this point a page of history is worth a volume of logic."

What, then, is the historic record?

Massachusetts adopted this resolution, Elliot's Debates Vol. I, p. 332.

"As it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this

Commonwealth, and more effectually guard against an undue administration of the Federal Government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution."

"'1. That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised.'"

The Convention enjoined it upon their representatives in Congress "to exert all their influence and to use all reasonable and lawful methods to obtain a ratification of the said alterations and provisions in such manner as is provided in said Article" (Article V).

South Carolina, Ibid, p. 325.

After ratification:

"This Convention doth also declare that no section or paragraph of the said Constitution warrants a construction that the States do not retain every power not expressly relinquished by them and vested in the general Government of the Union."

New Hampshire, Ibid, p. 326.

After ratification the Convention add:

"As it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this State, and more effectually guard against an undue administration in the Federal Government, the Convention do therefore recommend that the following alterations and provisions be introduced in the said Convention."

"'1. That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised.'"

"And the Convention, in behalf of the people of the State, enjoin their representatives in Congress to exert all their influence and to use all reasonable and legal methods to obtain the ratification of the said alterations and provisions, in such manner as is provided in the Article" (Article V).

The ratification of *Virginia* is on page 327, *Ibid.* Vol. I. Reference is made to the debates in Vol. III pp. 656-663. It declares that it is advisable to ratify rather "than to bring the Union into danger by delay." It nevertheless declares "that no right of any denomination can be cancelled, abridged, restrained or modified by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President or any Department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes." It then proceeds to recommend certain amendments, the first of which is on page 659:

"That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the Departments of the Federal Government."

New York, Ibid., Vol. I p. 327.

The preamble to the ratification declares:

"That every power, jurisdiction and right which is not by the said Constitution clearly delegated to the Congress of the United States or the Departments of the Government thereof, remains to the people of the several States or to their re-

spective State Governments to whom they may have granted the same."

After a declaration of rights in other particulars it proceeds (*Ibid.*, p. 329):

"Under these impressions, and declaring that the rights aforesaid *cannot be abridged or violated*, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration, the said delegates, in the name and in the behalf of the people of the State of New York, do by these presents assent to and ratify the said Constitution."

The Convention then, in behalf of the people of the State, enjoin upon their representatives in Congress "to exert all their influence and use all reasonable means to obtain a ratification of the following amendments."

The ratification of *Rhode Island* came after the first ten amendments were proposed. This ratification is at Vol. I, pages 334-5. In the preamble Rhode Island declares:

"III.—That the rights of the States respectively to nominate and appoint all State officers and every other power, jurisdiction and right which is not by the said Constitution clearly delegated to the Congress of the United States or to the Departments of government thereof, remain to the people of the several States or their respective State governments, to which they may have granted the same."

After several other recitals the ratification proceeds, p. 335:

"Under these impressions, and declaring that the rights aforesaid *cannot be abridged or vio-*

lated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments hereafter mentioned will receive an early and mature consideration, and conformable to the Fifth Article of the said Constitution speedily become a part thereof, we, the said delegates, in the name and in the behalf of the State of Rhode Island and Providence Plantations do by these presents assent to and ratify the said Constitution." (March 29, 1790)

Then follows a resolution enjoining the Senators and Representatives from Rhode Island to exert all their influence and use all reasonable means to obtain a ratification of the following amendments to the said Constitution (p. 336).

"1. The United States shall guarantee to each State its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States."

The preamble and resolution propose twelve amendments to the Constitution. These are printed at pages 338-9. The first two were not agreed to. The remaining ten are those which were ratified.

2. The debates in conventions show clearly that such amendments as the Ninth and Tenth were formulated in convention and agreed to, as essential parts of the Constitution before it was ratified.

Elliot's Debates, Vol. II, p. 122.

MASSACHUSETTS:

"The President of the Convention proposed amendments "in order to remove the doubts and quiet the apprehensions of gentlemen. Mr. Samuel Adams, page 125, said that States that had not

yet acted would be influenced by the proposition which Governor Hancock had submitted. The following day Mr. Adams continued, page 131, "Your Excellency's just proposition is 'that it be explicitly declared that all powers not expressly delegated to Congress are reserved to the several States to be by them exercised.' This appears to my mind to be a summary of a bill of rights which gentlemen are anxious to obtain. It removed a doubt which many have entertained respecting the matter, and gives assurance that if any law made by the Federal Government should be extended beyond the Power granted by the proposed Constitution *and inconsistent with the Constitution of this State, it would be an error, and adjudged by the Court of law to be void.*" He voted for ratification, page 278. This was adopted by Yeas 187, Noes 168, page 181.

The circular letter sent by the Massachusetts Convention to the Governors of the several States, dated July 28, 1788, is at pp. 413-14. It begins:

"Several articles in it appear so exceptionable to a majority of us, that nothing but the fullest confidence of obtaining a revision of them by a general convention, and an invincible reluctance to separating from our sister States, could have prevailed upon a sufficient number to ratify it without stipulating previous amendments."

It urges that the earliest opportunity be taken for making amendments.

After the ratification by the PENNSYLVANIA Convention, a large meeting of citizens was held at Harrisburgh. This meeting after free discussion and mature deliberation adopted certain resolutions, printed at pp. 543-46, Vol. II. Page 543:

"We are clearly of opinion considerable amendments are essentially necessary. In full confi-

dence, however, of obtaining a revision of such exceptionable parts by general convention, and from a desire to harmonize with our fellow-citizens, we are induced to acquiesce in the organization of said Constitution."

It then goes on to urge prompt action to obtain amendments, and presents a petition to the Pennsylvania Legislature to propose some specified amendments. Among them, page 545, is the following:

"All the rights of sovereignty which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with and shall be exercised by the several States in the Union according to their respective Constitutions."

In the report of the Convention of MARYLAND it is stated that after the vote of ratification had passed, Mr. Paca brought the proposed amendments before the Convention

"declaring that he had only given his assent to the government under the firm persuasion and in full confidence that such amendments would be peaceably obtained so as to enable the people to live happy under the Government. That the people of the county he represented and that he himself, would support the government with such amendments, but without them not a man in the State, and no people, would be more firmly opposed to it than himself and those he represented."

Elliot Debates Vol. II, p. 549.

A committee was appointed to propose amendments. The first proposed by it, page 550, is as follows:

"That Congress shall exercise no power but what is expressly delegated by this Constitution."

This amendment was agreed to by the Convention, Ibid., page 552. Page 554 all the members who voted for ratification

"declared that they would engage themselves under every tie of honor to support the amendments they had agreed to."

3. Historians agree that the ratification by the States just mentioned was upon the understanding and agreement that the amendments reserving the right of each State to local self government would in substance be adopted.

Stephens, War between the States. Vol. I, pp. 489, 490.
Tucker, Constitution of the United States, Vol. I, p. 130, Vol. II, pp. 665, 667, 691.
Bancroft, History of the Constitution, Vol. II, p 272.
Schouler, History of United States, Vol. I, p. 60.

"These amendments may be said to have completed the Constitution, in the sense that it was urged, and in effect admitted, that what they contained deserved a place in the instrument itself."

The Cambridge Modern History, Vol. 7, Sec. 1789, p. 304.
Curtis on the Constitution. Vol. II, p. 162.
See Robertson *v.* Baldwin, 165 U. S. 275, 281.

4. These ten amendments constitute a Bill of Rights, which can only be repealed or altered by the unanimous consent of all the States. They

are here reprinted in order to bring out more distinctly their fundamental character. It would indeed be an evil day for America if it should be held that it is competent for a majority of Congress and of the State Legislatures to deprive American citizens of these fundamental rights. To set up an established church, to prohibit the free exercise of religion, to deprive an accused person who has been acquitted of the benefit of that acquittal, to deprive a citizen of life, liberty or property without due process of law, to deprive him of the right of trial by jury; all this could be done by a majority in Congress and of the State Legislatures if the proposition of the appellees that there is no limit to the power to amend should be sustained.

The President, in his address at the opening of the Washington Conference (1921) thus stated the proposition on which we rely:

"Inherent rights are of God, and the tragedies of the world originate in their attempted denial."

I.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II.—A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

III.—No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

IV.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VI.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

VII.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

SEVENTH.

The effect of these amendments was to limit the general power conferred by Article V.

In Barron vs. Baltimore, 7 Peters, 243, the Court, by Chief Justice Marshall, said:

> "In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general governments not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States."

To the same effect is:

Spier *vs.* Illinois, 123 U. S. 131.

Miller, Lectures on the Constitution, p. 91.

2 Watson, Constitution of the United States, p. 1528.

Public Service Commission *vs.* N. Y. C. R. R., 193 App. Div. 615 (3 Dept.)

At page 619 the Court said:

> "But like all other powers granted to Congress by the United States Constitution (Art. I. §8) the power to regulate commerce is subject to all the limitations imposed by such instrument, including the Fifth and Tenth Amendments. Congress has supreme control over the regulation of interstate and foreign commerce and with the Indian tribes, but if in the exercise of that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by the Fifth Amendment and can take only on payment of just compensation."

EIGHTH.

Partial subversion fatal.

1. The fact that this proposed amendment does not subvert the whole fabric of local State Government is immaterial. It does in part and that is fatal to its validity.

Fairbank *v.* United States. 181 U. S. 283.

At p. 301, the Court said:

"In short the Court held in that case (Monongahela Navigation *v.* U. S. 148 U. S.) that Congress could not by any declaration in its statute avoid, qualify or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent.

"In Boyd *v.* U. S. 116 U. S. 616, the fifth section of the act of June 22, 1874, 18 Stat. 186, which authorized a court of the United States in revenue cases, on motion of the District Attorney, to require the defendant or the claimant to produce in court his private books, invoices and papers, or else that the allegations of the attorney as to their contents should be taken as confessed, was held unconstitutional and void as applied to an action for penalties or to establish a forfeiture of the party's goods, because repugnant to the Fourth and Fifth Amendments to the Constitution. The case is significant, for the statute was not so much in conflict with the letter as with the spirit of the restrictive clause of those amendments, and in respect to this the court said:

" 'Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and affects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approach and silent deviation from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon' " (p. 635).

S. P. U. S. *v.* Hvoslef, 237 U. S. 9;
Thames & Mersey Ins. Co. *v.* U. S. *Ibid.* 19.

2. It will be argued that this effect to be given to the Ninth and Tenth Amendments is an implica-

tion. We reply that that which is implied is as much a part of the Constitution as that which is expressed.

> Fairbank *v.* United States. 181 U. S. 283.
> Approved Selliger *v.* Kentucky 211 U S. 200.

As said by Mr. Justice Miller in Ex parte Yarbrough, 110 U. S. 651, 658:

"The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of the Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel, though directed to the authority of that body to enact criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed."

Among those matters which are implied, though not expressed is that the Nation may not in the exercise of its powers prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it.

In other words, the two governments, National and State, are each to exercise their power as

needed, so as not to interfere with the free and full exercise by the other of its Power.

Collector *v.* Day. 11 Wall. 113.

At page 127, the Court said:

"It is admitted that there is no express provision in the Constitution that prohibits the Federal Government from taxing the means and instrumentalities of the State, nor is there any prohibition of the State from taxing the means or instrumentalities of that government."

"In respect to the reserved powers that state is as sovereign and independent as the general government."

S. P. Evans *v.* Gore, 253 U. S. 245. 40 S. C. R. 550.

NINTH.

Civil War Amendments.

1. The right to regulate local elections for state offices and to determine the qualifications of the voters at such elections is fundamental. It is an essential part of local self-government. To deprive a State of it is to extend the Constitution to a field entirely different from any covered by it. It is not properly an amendment but a revolutionary change.

Federalist No. 51 deals with the qualifications of the electors of the House of Representatives.

"The definition of the right of suffrage is very justly regarded as a fundamental article of Republican Government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution."

"To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the Convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself."

Ed. Ford, p. 342. (In some editions this article is numbered 52.)
Ed. Dawson, p. 365.

2. If the precedent of the 13th, 14th and 15th amendments is relied upon, the answer is that they were revolutionary and were imposed upon the seceded States as a result of Civil War and as a condition of their admission to the Union. They were finally assented to by each of them and thus became by unanimous consent a part of the Constitution.

The Thirteenth Amendment was proposed February 1, 1865, and was declared to have been ratified in a proclamation by the Secretary of State, December 18, 1865. The Fourteenth Amendment was one of those growing out of the Civil War, and relates to the civil rights of citizens of the United States, excludes from Federal offices those who had served the Confederacy, and prohibits the payment of the Confederate debt. This was proposed June 16, 1866, and was conditionally declared to have been ratified in a proclamation by the Secretary of State, July 28, 1868. The ratification of this Amendment was imposed by Congress as a condition of the readmission to the Union of the seceded States. The same is true of

the Fifteenth Amendment, which was proposed February 27, 1869, and was declared to have been ratified in a proclamation by the Secretary of State, March 30, 1870.

Especial attention is drawn to the facts before mentioned as to the circumstances under which these Amendments were declared ratified, because no inference should be drawn therefrom as to the ratification or validity of amendments in ordinary times. The question as to whether or not the seceded States were entitled to readmission unconditionally was decided in the negative by the great majority of the Northern people at the polls and in Congress. What was done was really a reconstruction of the Union, and was so conceded at the time. The history of the proceedings is given in Blaine's *Twenty Years in Congress*, vol. 2, pp. 188-217; 414-421. The whole proceeding on these Amendments was equivalent to the adoption of a new Constitution, as far as negro slavery and negro suffrage were concerned.

These amendments were the offspring of the Civil War. That conflict originated in disputes about slavery. The Emancipation Proclamation was issued by virtue of the War power, and when the war was over it was fitting to remove its cause.

Stuart *v.* Kahn, 11 Wall, 493, 507.

In this case, the Court said:

This war "power is not limited to victories in the field and the dispersion of the insurgent forces; it carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

It is not denied that the suffrage amendment might become a part of the Constitution, if agreed to by all the States. The contention is that under the Tenth amendment no State can be deprived of the right to regulate local suffrage for state offices without its consent.

TENTH.

Prohibition Cases.

Rhode Island vs. *Palmer*, 253 U. S. 350

and the other Prohibition cases are relied upon to sustain the validity of the Nineteenth Amendment. But an examination of these cases in connection with

Jacob Ruppert vs. *Caffey*, 251 U. S. 264,

shows that the decisions in these cases were placed wholly upon the police power and the consequent authority to do anything in connection with the traffic in intoxicating liquors that the Court might deem "necessary to the peace and security of society." In the Ruppert case the Court cites

Mugler vs. *Kansas*, 123 U. S. 623.

The Court in this case cites with approval

The License Cases, 5 Howard, 504

and at pages 657 and 658 quotes with approval the language of Taney, C. J., page 577, of the report in Howard, McLean, J., pp. 588, 589, Woodbury, J., p. 628 and Grier, J., pp. 631 and 632.

In these cases this Court laid down distinctly the proposition that the traffic in intoxicating

liquors was subject entirely to the exercise of the police power. In the Ruppert Case the Court cited with approval,

Barbier vs. *Connolly*, 113 U. S. 27, 31,

in which it was held that the Fourteenth Amendment did not affect the police power of the States. Thus, for example, in the Mogler case, the Court held that the Legislature had power to prohibit from making beer breweries already erected in compliance with the laws of the State, and had power to thereby diminish the value of the brewery by three-fourths of such value, without making any compensation, and that it might also prohibit the sale of beer on hand at the time of the passage of the Act.

In short, these cases distinctly hold that the nature of the traffic in intoxicating liquors is such that the manufacturers and sellers have no rights that the State is bound to respect. But this rule obviously is limited to the peculiar character of that traffic and has no application to other Constitutional guarantees. In reference to these the rule is stated under the Seventh point.

It may thus be tested. Would anyone maintain for a moment that an act of the Legislature would be valid which should prohibit a baker from selling good bread which he had manufactured and had on hand, or from making bread in the future. The Legislature could, no doubt, regulate the hours of labor in the interest of the health of the employees and could compel the conditions of the work to be sanitary, but it could not be claimed that there was any right to prohibit a lawful trade like this. Certainly the right of suffrage has no connection with the police power. Whether the

right to participate in the election of representatives in the Legislature should be given to or withheld from any individual is for the sound discretion of the People in each State in framing its Constitution, in view of the conditions of the population in that State, and is in no sense an exercise of the police power.

ELEVENTH.

Republican Form of Government.

The amendment is also in conflict with the fundamental guarantee of Section 4, Article IV.

"The United States shall guarantee to each State in this Union a Republican form of Government."

1. The provision here quoted from the Constitution of the United States constitutes a covenant and likewise a limitation of power invocable against the United States in favor of each several state.

The limitation is one of two such, wherein the power to amend the constitution of the United States is cut off by the terms of that instrument.

In the one instance, a matter wholly within the scope of Federal action as defined by the constitution, is placed beyond the power of change by an express prohibition. In the other, an intrusion into the domain of state action as deliminated by the constitution, is forbidden even under guise or form of an amendment, by the well understood disability to destroy or disregard its own guaranty, which limits the power of every guarantor.

A change in the representation of the states in the Senate of the United States, would be germane to the scope of the Federal government and might well be made through constitutional amendment, were it not for the express prohibition of such action, a limitation which is incapable of removal save through the consent or acquiescence of every state concerned.

An abolition of the Republican form of Government which is guaranteed to every state, cannot be permitted or accomplished by the United States or under its constitution, without the consent, at least of every state affected by such abolition and presumably by all of the states. The guarantee of a Republican form of government is a more forceful denunciation against any possibility of change in the fundamental law, than is the prohibition that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

The latter is a prohibition against an act within the ordinary range of governmental activities. The former is a solemn undertaking on the part of the United States to guarantee to each state a Republican form of Government.

The law applicable to guarantors is well understood. The warantor of any title or immunity undertakes to protect the one guaranteed therein, as against all of the world, himself included. Not only so, but the guarantor is absolutely estopped from asserting any right or performing any act in derogation of the right vouched to the person guaranteed, so that even an after acquired title, though valid, enures to the benefit of the one guaranteed in respect to its subject.

We have, then, the right to a Republican form of Government, which was enjoyed by the States

prior to the Constitution, guaranteed to them thereunder in perpetuity, by the United States.

"The object of this provision was to secure to the people of each State the power of governing their own community, through the action of a majority according to the fundamental rules which they might prescribe for ascertaining the public will."

2 Curtis History Constitution 82.

Should the Court desire to pursue the inquiry on this point, a convenient compilation of Orders, Articles of Colonial Confederation, Plans of Organization, Conventions and other public documents dating from 1638 to 1786, may be found in the Appendix to the PRINCIPLES OF THE FEDERAL LAW by HERMAN W. CHAPIN. That appendix also contains a parallel column tabulation of such documents, correlated with provisions found both in them and in the Constitution of the United States.

Proceedings upon the ratification of the Constitution and concurrent therewith as heretofore quoted in this brief, disclose an opinion to have existed at the time of the adoption of the Constitution, to the effect that a state might perhaps withdraw from the Union of States, but even so the guaranty of a Republican form of Government was placed in the original document and always has there remained. When the Civil War and subsequent events settled the question respecting the Federal right to retain States against their will, the guarantee of a Republican form of Government sprang into a new and an added significance as to the protection which every State should enjoy within the limits of its own constitutionally defined sovereignty.

No constitutional change or amendment within the United States Government or in or concerning its own constitution can or should be permitted to override its express guarantee to every state a Republican form of Government. The United States is a corporation—a sovereign political corporation. Every state is a corporation—a sovereign political corporation. Each is sovereign within limitations and within its own sphere, but no internal change or alteration of its own constitution can change or alter the fixed contractual or guaranteed relationship between the two, without the free consent of both.

The United States is the guarantor. As well might a business corporation attempt to disengage itself from its contracts, obligations or guarantees, through an amendment of its certificate of incorporation or by-laws, as the United States of America to discharge itself from its guarantee of a Republican form of Government to every state, through an amendment of its own constitution inconsistent with its obligation, definitely assumed and heretofore unquestioned. Such an attempt implies a confusion of thought. A State as part of the Union may ratify, concur in, or consent to a constitutional amendment to any effect whatsoever, but another state, holding the guaranty of the Nation, cannot be forced against its own several will to relinquish that guaranty even though every other state should vote so to do.

2. What is a Republican form of Government?

Mr. Justice Wilson, in *Chisholm* v. *Georgia*, 2 Dallas 457, says:

"My short definition of such a government is that the supreme power resides in the body of the people."

The framers of the Constitution knew the answer definitely and well. Each came from a state having a government organized under a constitution adopted by duly qualified voters dwelling therein, and enjoying a legislative and executive authority constituted in like manner. The voters in every state were such persons as held the franchise under its own constitution and laws and none others. None outside of the state ever had dreamed of interfering with that franchise subsequently to the War of the Revolution, or indeed to any great extent for appreciable periods theretofore, in many instances of colonial organization.

Principles of Federal Law, Chapin, supra.

A Republican form of Government, meant and means a representative government such as was the government of each of the original states and in every one of those states the franchise of the free men was the cornerstone of the political structures. All the several state franchises were unlike, each to the other, saving in one thing, and that one thing was the absolute and complete control by each state of its own franchise grants, limitations and requirements, in respect to the right to vote. That one requirement of the franchise and everything built up and to be maintained through, under, and by reason thereof, was and is the Republican Form of Government which the United States of America guaranteed through its Constitution and the limitations thereof.

3. The Constitution of the United States itself recognizes and reflects the varying, but always locally controlled franchise regulations of the several states, wherein it provides:

"The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

Any control of the franchise from without is a destruction of that Republican Form of Government guaranteed to every state, and in the exercise of such control, the United States of America is no more a part of any state for the purposes of, or in connection with, the administration or continuation of the guaranteed form of State Republican Government, than would be the Kingdom of Great Britain, the Dominion of Canada, or some adjourning state of the Union.

For the purposes of its Republican form of Government, every state is sole, independent, self-contained and exclusive of every other state and nation, including the United States of America, its guarantor.

Suppose that by some external power minors should be enfranchised against the will of a State —or aliens resident—or aliens non-resident—or citizens of other States—would that State then enjoy the guaranteed Republican Form of Government? Suppose such franchise enforced against a State by an outside power other than the United States,—would not the Nation be bound to heed the call of any one State for help?

The District of Columbia in which this Court sits, by special constitutional provision and consequent legislation, is governed altogether by Congress. So were the conquered provinces under the Republic of Rome by the Senate thereof. It will not be contended that any form of govern-

ment such as are the forms imposed upon the District of Columbia, and the territorial domains of the United States, might be imposed upon a State of the Union, without breach of faith and a breach of the express covenant of guaranty whereby a Republican Form of Government is assured to every state.

Pro tanto, the Republican Form of Government would be destroyed in every non-consenting state, should the proposed amendment receive sanction in the courts against it, and the very heart and soul of the living principle of Republican Government would die out from the Governmental organizations of the Union of the States. If the power to tax is the power to destroy, then also indeed is the power of the ballot the power of control.

4. But some one may say that the Constitution did not guarantee such Republican form of government as each State might organize for itself, and that therefore it would be legal for the United States, by an amendment to its Constitution, to change the form of government of any State, provided that such changed form shall be Republican. Such construction would protect the State in nothing. The essence of the guarantee to preserve a Republican form of government in each state is that the people of each state shall govern themselves in their own way with respect to all matters not surrendered to the Federal government.

We must bear in mind, upon consideration of the question presented, that an extension of the suffrage to one involves a corresponding limitation of the influence of the suffrage as enjoyed by another, so that the right to extend would necessarily imply the right to limit, and, indeed, there

is no point at which the National regulation of state suffrage might be halted, if that power be held to exist for any purpose whatsoever, saving under the stress of civil war and reconstruction.

Moreover, there is no constitutional prohibition against the enforcement of varying provisions as to suffrage within the various States. Such absence of restraint is not surprising when we remember that the existence of power in the federal government to change the constitution of a State was undreamed of at the foundation of the government. As we have seen, indeed, the Constitution of the United States contemplates varying qualifications for the suffrage among the several States. A future nation then might decree white suffrage for Massachusetts, black suffrage for Alabama, red suffrage for Indiana, yellow suffrage for California, mulatto suffrage for Virginia, male suffrage for Nevada, and female suffrage for Vermont, with varying degrees of age and property qualifications. Grotesque, indeed, but constitutional according to our opponents.

Soberly it is not impossible to foresee strange restrictions upon suffrage in various states imposed by the United States under stress of political necessities.

How then should the Nation disregard or be allowed to disregard and destroy its guaranty to any several state, and in its own proper person to perpetrate an infraction against the Republican Form of Government adopted and desired by that State, the defense whereof the State has entrusted to the United States upon the faith and credit of the guarantee of the United States, disabling itself from its own protection by so doing,

and relying solely upon the limitation of National power as it should be declared by the Courts?

5. It is shown under the Eighth Point that it is not necessary, in order to determine the invalidity of a particular law, to show that this law altogether subverts the rights guaranteed. It is enough to condemn the proposal that it is an encroachment on a constitutional right.

> Boyd *v.* United States, 116 U. S. 616.
> Fairbank *v.* United States, 181 U. S. 283.
> Stamp Tax Refund Cases, 200 U. S. 488.
> U. S. *v.* Hvoslef, 237 U. S. 9.

TWELFTH.

Validity ratifications.

1. The right to regulate the creation and mode of action of the State Legislature is vested in each State. It was not taken from it by the Constitution originally and it is guaranteed to it by the Tenth amendment.

2. There is nothing in this contention inconsistent with the decision of this Court in the Ohio case.

> Hawke *v.* Smith, 253 U. S. 221; 40 S. C. R. 495.

That held that the referendum section in the Ohio Constitution did not make the popular vote a part of the "legislature." It construed the latter word in its usual sense, and held it to be a

representative body. The logic of this decision supports our present argument. The legislature of a State is created by the Constitution of that State. The validity of any laws it makes are to be determined by that Constitution. Its sessions and procedure often are and always may be regulated by that Constitution.

It is claimed, however, that this Court in deciding that case changed the source of political power in the United States from the people of the United States to the Congress—turned the whole sovereignty of the people over to their creatures the State Legislatures whenever Congress so willed.

On the contrary all that Hawke *vs.* Smith decided was that a State could not create new agencies for ratification other than those provided in Article V. by making the Legislature's ratification conditional on its being approved by popular vote.

The Legislature of Ohio was to proceed as before to ratify or reject. It was attempted, however, to add a new machinery (not contemplated by Article V.) to comprise part of the act of ratification. Article V. contemplated "legislatures" restrained as they had always been by the law of their creation. It does not contemplate "legislatures plus a referendum."

3. When, therefore, the Constitution of Tennessee provides (Article XXX, bill, p. 20) that the General Assembly shall not act upon any amendment to the United States Constitution unless the "General Assembly shall have been elected after such amendment has been submitted" it provides for a proper and orderly representation of the people in that assembly upon the deci-

sion of this fundamental question. It is analogous to the submission in 1788 of the original Constitution to Conventions elected in each State after the Constitution had been proposed and submitted for their consideration.

The people of Missouri had power to declare, as they did in their Constitution (bill, Article VII, p. 6) that "the Legislature is not authorized to adopt any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of this State."

In like manner, the people of West Virginia had power to declare as they did in their Constitution (bill, Article XVIII, pp. 10, 11) that it should require a two-thirds vote to expel a member and that a Senator who removes from his district during his term shall thereby lose his seat. The Senate of West Virginia had the power, which all legislative bodies have, to prescribe rules for the orderly conduct of its business. In pursuance of this power, it made a rule (52 bill, p. 24) that "The question being once determined must stand as the judgment of the Senate." Then follow clauses for enforcing this rule. Nevertheless, after a resolution to ratify the proposed suffrage amendment had been defeated in the West Virginia Senate and a motion to reconsider the same had been defeated, the Senate of that State by a bare majority voted to expel one of its members, ignored the fact that another had removed from his district, and then went through the form of ratifying by a bare majority of the quorum thus illegally obtained, the suffrage amendment. Bill, Articles XVIII, XIX; pp. 10-12.

In the part of their constitutions known as the "Bill of Rights", the people of Missouri, Rhode Island, West Virginia and Texas have forbidden their Legislatures to impair their right of "local self-government" and the people of Tennessee have forbidden the members of their Legislature to record the "assent of their State" to any Federal Amendment proposed subsequent to their election.

4. When the people of all the States entered the Union they did not surrender to Congress the right to endow incompetent Legislatures with "omnipotent" power simply by submitting Federal Amendments to them for ratification.

The people did cede to the Congress the right to propose to their "legislatures", the very much restrained representative bodies which "made the laws for the people", such amendments as Legislatures were competent to ratify.

But by the alternative method provided in Article V for which there can be no other purpose, the people, in the same sentence reserved to themselves, acting directly in State Conventions (the only way they can act directly in their sovereign capacity, McCulloch *vs.* Maryland, 4 Wheaton 403) the power to ratify all Federal Amendments as to which the legislatures were not "competent."

(Note, that even the people thus acting directly are "incompetent" to deprive any State of its "equal suffrage in the Senate.")

The people thus adopted the Constitution.

It was the only way they could have adopted it. For as Madison said (5 Elliott's Debates 355):

> "the Legislatures were incompetent to the proposed changes"
> * * * * * * * *
> "it would be a novel and dangerous doctrine that a legislature could change the Constitution under which it held its existence."

Mason also agreed with Madison (5 Ell. Deb. 352). He said:

> "The legislatures have no power to ratify it. They are the mere creatures of the State Constitutions and can not be greater than their creators * * * Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them. It was of great moment that this doctrine should be cherished as the basis of free government."

How can any one suppose that the framers when actually in the very act of following Madison's and Mason's advice to submit the Constitution to the people themselves acting directly in State Conventions, nevertheless, in the same breath, by Article V. approved the other "novel and dangerous" method and authorized it to be applied at the pleasure of Congress.

If so, the alternative provided for State Conventions was totally unnecessary.

In view of this it is legally doubtful if any of the 23 Legislatures in the male suffrage States counted as ratifying were competent to so amend the "male clauses" of their State Constitutions. It is legally certain that the Legislatures of Missouri, Rhode Island, West Virginia, Texas and Tennessee were not competent to ratify.

The people were certainly not giving to Congress in Article V the right to endow "incompetent" legislatures with unlimited powers to "un-

make" the Constitution which they were not competent to approve.

The people made the Constitution and the people alone can unmake it.

Cohens *vs.* Virginia, 6 Wheaton 389.

No implication can grant such power to Congress.

The discretion to "propose' 'to legislatures does not change the meaning of the term "legislature" or endow the body so named with new powers or abolish restraint inherent in the very nature of the political agent bearing that name.

It is true the legislatures derive from Article V their power to ratify such amendments as their people have not prohibited them from ratifying by clauses in their State Constitutions.

But when they come to act on a Congressional proposal each legislature speaks, not for people outside its State, *but for its own State and people alone*, otherwise it would record something other than "the assent of its State."

In attempting to override the will of its own people incorporated by them into their organic law it attempts to turn their refusal into an "assent."

If Congress can remove, in its discretion, by "proposing" amendments to them, the limitations which the people of a State have imposed upon their legislature then it is not the "*assent of the State*" which is recorded at all, but the unrestrained individual view of the members of its legislature perhaps elected (as 34 legislatures were here) before the proposal was made by Congress; perhaps called into special session (as 30 legislatures were here) and utterly lacking a popular mandate.

When the people of a State elect a legislature on other issues do they give it blanket authority to disfranchise them, or to dilute their votes by enfranchising others, by means of any Federal Amendment to that end, which may be *subsequently* "proposed" by Congress?

The question answers itself. In that event the people of every State hold all their political rights at the discretion of Congress and omnipotent unrestrained legislatures.

Yet that is the sole foundation upon which the asserted legality of the 19th Amendment rests.

If so it completely destroys any residuary sovereignty in the people of the States.

When on the other hand the citizen votes for members of a State Convention under the alternative plan provided by Article V newly called to act in his name upon a Federal Amendment necessarily *previously* proposed by Congress the issue is always direct and certain and the popular mandate complete.

5. The provision in the constitution of Tennessee has been quoted:

The Texas Bill of Rights declares:

> "Article I. Sec. 1. Texas is a free and independent State subject only to the Constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the States.
>
> Sec. 29. To guard against transgressions of the high powers herein delegated we declare that everything in this "Bill of Rights" is excepted out of the general powers of government and all laws contrary thereto or to the following provisions shall be void."

As the only act of any Texas officials which could impair the right of local self-government of the State of Texas would be the action of the legislature of the State of Texas in ratifying a Federal Amendment having that effect, such action is "excepted out of the general powers of government," that is forbidden by Sections I and 29 of the Texas Bill of Rights.

The Rhode Island Constitution (1843) says:

ARTICLE I.

(*Preamble to Bill of Rights.*)

Declaration of certain Constitutional Rights and Principles.

"In order effectively to secure the religious and *political freedom* established by our venerated ancestors, and to preserve the same for our posterity we do declare that the essential and unquestionable rights and principles hereinafter mentioned shall be established, maintained and preserved and shall be of paramount obligation in all legislative, judicial and executive proceedings."

SEC. I. "In the words of the Father of his country we declare 'that the basis of our political system is the right of the people to make and alter their Constitutions of government, but that the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all!' "

No action of the Rhode Island Legislature is "competent" to record "an explicit and authentic act of the whole people of Rhode Island" unless Congress in defiance of the people of Rhode

Island can give it that competency, in which case it is certainly not "the free and voluntary assent of that State and her people to the 19th Amendment," involving a change in the male suffrage clause of her State Constitution.

Again the Constitution (1872) of West Virginia says, Art. I, Sec. 2:

> "The government of the United States is a government of enumerated powers and all powers not delegated to it, nor prohibited to the States are reserved to the States or to the people thereof.
>
> Among the powers so reserved to the States is the exclusive regulation of their own internal government and police and it is the high and solemn duty of the several departments of government created by this Constitution, to guard and protect the people of this State from all encroachments upon the rights so reserved."

If that is not a mandate to the Legislature of West Virginia, which is certainly one of the "several departments of government" of that State not to vote for a Federal Amendment which attacks her "internal government" by taking from her citizens in part the right to choose the voters of that State, it means nothing.

In face of that mandate to the people of West Virginia can any one contend that the action of the West Virginia Legislature in voting to ratify the 19th Amendment expressed the free and voluntary "assent of that State" to its enactment.

6. The above four states were among the "male suffrage states"; that is each of their constitutions also contained a provision limiting their suffrage to "males." These provisions were entirely consistent with the Federal Constitution.

The members of these four legislatures were all bound, by their official oaths as such, to support and defend their State Constitutions. Nevertheless a majority in each *as counted* ignored their official oaths, violated the express provision above quoted forbidding them to ratify and sought to amend by indirection the "male clauses."

We are dealing here not with the effect of the 19th Amendment if validly enacted, upon State Constitutions which it would of course supplant, but with the "competency"; the "power" of "legislatures" to validly record the "assent of their States" thereto.

The assent of a particular state must be the free and voluntary act of the people of that State however much it must conform to the method Article V has fixed.

The "legislature" which acts (however it derives its powers), is still composed of State officials elected, organized and acting in the orderly way prescribed by the Constitution of that State and necessarily subject to all the limitations prescribed therein, limiting its power to act, prescribing the place of meeting, its dual form of organization, the procedure and all its powers.

In conformity with them and not otherwise it must record the "assent or dissent of its State."

7. If Congress can remove all the State restrictions on its powers and make it omnipotent; then its members are not members of the State Legislature at all, but Federal officials acting under a Federal Power and in no sense of the word would they record the "assent of their State" to a proposed amendment. The States as such would cease to take part in amending the Federal Constitution.

There is no such political concept in this country as the people of the United States in the *aggregate*.

The people do not speak, never have spoken, and never can speak in their sovereign capacity, otherwise than as the people of the States. There are but two modes of expressing their sovereign will known to the people of this country. One is by direct vote. The other is the method here generally pursued, of acting by means of conventions of delegates elected expressly as representatives of the sovereignty of the people.

Now, it is not a matter of opinion or theory or speculation, but an undeniable historical *fact*, that there never has been any act or expression of sovereignty in either of these modes by that imaginary community "the people of the United States in the aggregate."

Usurpations of power by the *Government* of the United States there may have been and may be again, but there has never been either a sovereign convention or a direct vote of the whole people of the United States in the aggregate to demonstrate its existence as a corporate unit or political sovereignty.

Every exercise of sovereignty by any of the people of this country that has actually taken place has been by the people of the States as States.

No respectable authority has ever denied that, before the adoption of the Federal Constitution the only sovereign political community in this country was the people of each State.

When the Confederation was abandoned; when the Constitution was adopted by the people of the several states in their State Conventions; the General Government was re-organized, its structure

was changed, additional powers were conferred upon it, and thereby substracted from the powers theretofore exercised by the State Governments; but the seat of sovereignty—the source of all those delegated and dependent powers—was not disturbed. The only change was in the form, structure and relation of their governmental agencies.

There was a new *government*, but no new "*sovereign people*" was created or constituted.

The people, in whom alone sovereignty inheres, remained just as they had been before.

Madison said in the Virginia Ratification Convention (3 Ell. Deb. 94):

> "Who are parties to it? The people—but not the people *as composing one great body*, but the people as composing thirteen sovereignties."

Lee of Westmoreland said (3 Ell. Deb. 180):

> "If this were a consolidated government ought it not to be ratified by a majority of the people *as individuals* and not as States."

Charles Pinckney in the South Carolina Convention said (4 Ell. Deb. 328):

> "With us the sovereignty of the *Union* is in the *people*."

It is with the power of the sovereign people of the United States to unmake *their* constitution, establishing *their* Federal Government which they themselves created, that we are now dealing. The question is whether that sovereignty has now been transferred to Congress and omnipotent State legislatures specially endowed by Congress, to the extent of depriving them, the only "people

of the United States" who ever existed or can exist, of their inherent right to determine for themselves who shall exercise their sovereignty, who shall constitute their electorate, in other words who shall govern their States and elect their Congressmen and Senators.

If their Congress and legislatures, specially endowed by Congress, determine in whole or in part the suffrage qualifications for the people (and in doing so brush aside the restrictions the "people" in their State Constitutions have placed upon them as their agents)—if these omnipotent agents holding no popular mandate can even disfranchise the people directly, or what is the same thing indirectly dilute their votes by enfranchising others; then the sovereignty of the people of the United States has become a myth.

These "servants of the people" exercise without limit the people's own sovereign power whenever Congress makes a proposal which endows them with that right.

This is the inevitable result of making a "scrap of paper" of the provisions of their State Constitutions inserted by the people of the five States of Texas, Tennessee, Missouri, Rhode Island and West Virginia to protect themselves from this very abuse of power.

This disposes of the claim that the people of the States in ratifying the Constitution ceded away all right to curb or limit the "power" of their agents the State legislatures in ratifying Federal Amendments, who strange to say (according to the claim) though clothed with omnipotent power still remain mere agents of the people of the States for recording the "assent of their States," but assert the right nevertheless to negative the expressed will of their own people.

To whom according to this startling theory could the people of the States have ceded their sovereign rights when they ratified the Constitution? Not to the mass of people inhabiting the territory embracing all the States for there was no such community in existence and they took no measures for the organization of such a community. If they had intended to do so the very style "United States", would have been a palpable misnomer, nor would treason have been defined as levying war against *them*.

Not to the Government of the Union, even if Congress which merely "proposes" to the States and the legislatures Congressionally endowed with omnipotence by the proposal, can all be construed to be part of the Federal Government for this purpose. For in the United States no sovereignty resides in Government or in its officials.

As Daniel Webster said (Congressional Debates Vol. IX, Part 1, page 565):

> "The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. Our governments are all limited. In Europe sovereignty is of feudal origin and imports no more than the state of the sovereign. It comprises his rights, duties, exemptions, prerogatives and powers. But with us all power is with the people and they erect what governments they please and confer on them such powers as they please. None of these governments are sovereign in the European sense of the word, all being restrained by written constitutions."

In the Declaration of Independence, in the Articles of Confederation and in the Constitution of the United States the corner stone is the inherent and inalienable sovereignty of the people.

To have transferred sovereignty from the people to a Government would have been to have fought the battles of the Revolution in vain—not for the freedom and independence of the people of the States, but for a mere change of masters. Such a thought or purpose could not have been in the heads or hearts of those who moulded the Union, who sought by the compact of Union to secure and perpetuate the liberties then possessed. Those who had won at great cost the independence of the people of their respective States were deeply impressed with the value of Union, but they could never have consented to fling away the priceless pearl of the sovereignty of the people of their States for any possible benefit therefrom. And they did not.

The people made the Constitution and the people alone can unmake it.

It is therefore submitted that the limitations which the people of Texas, Tennessee, Missouri, Rhode Island and West Virginia put upon their State Legislatures in the organic law of their creation are valid and binding. That those five legislatures were "incompetent" to ratify.

8. Each of said alleged ratifications is null and void.

Haire *v.* Rice, 204 U. S. 294.

At page 300, the Court said:

"This means that Congress, in designating the legislature as the agency to deal with the lands, intended such a legislature as would be established by the constitution of the state. It was to a legislature whose powers were certain to be limited by the organic law, to a legislature as a parliamentary body, acting within its lawful powers, and by

parliamentary methods, and not to the collection of individuals who for the time being might happen to be members of that body, that the authority over these lands was given by the Enabling Act. **It follows therefore that in executing the authority entrusted to it by Congress, the legislature must act in subordination to the State Constitution."**

THIRTEENTH.

1. Counsel have not in this Brief argued the point made in Article 16 of the bill (pages 8-9) that the power of legislatures to ratify amendments of the Federal Constitution is subject to the referendum. We bow to the authority of Hawke *vs.* Smith. But we submit that this decision makes it all the more important that the action of each legislature, which when valid, this decision makes final, should be in accordance with the Constitution and parliamentary law of each state. Members of the legislature have only delegated authority. If this authority once delegated cannot be revoked by the people, it is specially important that it should be exercised within the limits fixed by the Constitutions of the several States which have been adopted by the people thereof.

2. Counsel also have not argued at length the point made in Article XVII (pages 9-10) that in eleven states, the legislatures of which have adopted resolutions ratifying the Suffrage amendment; "The right of citizens to vote was restricted by the several constitutions of said states to citizens of the male sex and the several constitutions of said last mentioned states conferred no power upon the legislatures of said States respectively

to amend the Constitution of said States, but require that in all cases a proposed amendment to such Constitutions must be submitted to the vote of the people of said States respectively.

This point is still maintained, but inasmuch as the ratification by the five states of Missouri, West Virginia, Rhode Island, Texas, and Tennessee is directly and plainly in violation of the Constitutions of those states, it has not been thought necessary to dwell on the implied limitations created by the Constitutions of the other states just referred to.

But the argument is applicable to them. We have shown that a prohibition may be implied. It need not be expressed (*ante*, pp. 30-32). For this reason the ratifications by Wisconsin, Ohio, Pennsylvania, New Jersey, Massachusetts, Nebraska, North Dakota, Arkansas and Maine are invalid. They are ingenious devices to evade the plain requirements of the Constitutions of these states.

To quote again from

> Fairbank *v.* United States, 181 U. S. 283, 301:
>
> "Illegitimate and unconstitutional practices get their first footing in that way, namely by silent approach and silent deviation from legal modes of procedure" (*ante*, p. 30).
>
> Brown *v.* Maryland, 12 Wheat. 436.

At p. 439 the Court said:

> **"Questions of power do not depend upon the degree to which it may be exercised."**

A danger to our American system which has developed in the present generation is thus stated

by President Butler of Columbia University in a recent address:

> "Liberty, which once was endangered by monarchs and by ruling classes, has long since ceased to fear either of these; it is now chiefly endangered by tyrannous and fanatical minorities which seize control for a longer or shorter time of the agencies and instruments of government through ability and skill in playing upon the fears, the credulity and the selfishness of men."

An illustration of this is to be found in the November election in the State of New York. Representatives of the American Legion lobbied through two successive Legislatures a proposition giving absolute preference in Civil Service appointments and promotions to persons who had served in any position in the Army or Navy. This would have destroyed the Civil Service system of the State of New York, yet the pressure of the lobbyists was such that it received an almost unanimous vote from the Legislature. It was defeated by the people by a majority of over 250,000.

The distinguishing feature of the American Constitution is that it deals almost invariably with general terms, which become from generation to generation applicable to new conditions. When the term Legislature is used there is no attempt at definition or limitation. The framers of the Constitution recognized that this was for the people of the several States to determine. The legislatures are their creation. For example, when the Constitution was adopted some of the States had Legislatures consisting of a single chamber only. No one would pretend that the people of those States, so far as Constitutional

amendments were concerned, had no power to change the legislative body so that it should consist of two chambers. Again, no reference is made in the Constitution to orderly proceedings in the Legislature, yet no one would contend that the necessity of these was not implied. No one could claim that if the members of the Legislature of Tennessee or West Virginia had assembled without any call from the Governor and without conforming to the orderly rules of legislation, and had undertaken to adopt a resolution of ratification, that would have been invalid. They would have been a mob not a legislature.

If then the formation of each State Legislature is subject to the control of the people of each State and the action of the legislative body is subject to orderly rules created by the Constitution of the State or by its own action, it follows that it is within the power of the people of the State to determine in what manner their agents in the Legislature shall exercise the great power of ratifying a constitutional amendment.

The argument to the contrary ignores the fundamental fact that each government in this country is a government of limited and delegated powers; the source of authority is in the people. Through their respective Constitutions the people of each State delegate to their representative Legislatures certain powers. Beyond the powers thus conferred the Legislatures cannot go.

This doctrine is fundamental; it underlies the whole fabric of the American Constitution. It cannot be supposed that the framers of that Constitution in one respect alone undertook to give absolute and unlimited power to Legislatures which were not created by the United States and

only in certain specified respects subject to that jurisdiction.

FOURTEENTH.

Plaintiff's Standing in Court.

Complainant sues on behalf of a voluntary Association composed of members from many different States. They are all citizens and taxpayers and all but one of them have the right of suffrage within their respective States. (Bill, Article II, p. 2.) These rights are of great importance and value. Under the American system every citizen has an equal right to be protected in person and property. But the right of suffrage is the right to share in the selection of those who are chosen to administer the government, according to the Constitution and laws of the country, and subject to the authority of the courts. This right is valuable and entitled to the protection of the courts. This was stated clearly by Daniel Webster in his argument in the Dartmouth College Case.

> The Works of Daniel Webster, Vol. 5, p. 481.

"It cannot be necessary to say much in refutation of the idea, that there cannot be a legal interest, or ownership, in any thing which does not yield a pecuniary profit; as if the law regarded no rights but the right of money, and of visible, tangible property. Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right to be exercised at his own discretion, and it cannot be taken away from him. The exercise of this right directly and

very materially affects the public; much more so than the exercise of the privilege of a trustee of this college. Consequence of the utmost magnitude may sometimes depend on the exercise of the right of suffrage by one or a few electors. Nobody was ever yet heard to contend, however, that on that account the public might take away the right, or impair it. This motion appears to be borrowed from no better source than the repudiated doctrine of the three judges in the Aylesbury case (Ashby *v.* White, 2 Lord Raymond, 938). That was an action against a returning officer for refusing the plaintiff's vote, in the election of a member of Parliament. Three of the judges of the King's Bench held, that the action could not be maintained, because, among other objections, 'it was not any matter of profit, either in *presenti*, or in *futuro*.' It would not enrich the plaintiff in *presenti*, nor would it in *futuro* go to his heirs, or answer to pay his debts. But Lord Holt and the House of Lords were of another opinion. The judgment of the three judges was reversed, and the doctrine they held, having been exploded for a century, seems now for the first time to be revived."

This argument is concisely stated in report: 4 Wheat. 572. The Court sustained it.

> Dartmouth College *v.* Woodward, 4 Wheat. 518.

At p. 629 Chief Justice Marshall said:

"That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."

Mr. Justice Story said, p. 699:

"The truth, however, is that all incorporeal

hereditaments, whether they be immunities, dignities, offices or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them in case of any injury, obstruction or disseizin of them. Whenever they are the subject of a contract or grant they are just as much within the reach of the constitution as any other grant."

And again, at p. 701:

"The right to be a freeman of a corporation is a valuable temporal right. It is a right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of voting in Public elections; it is as sacred a right; and whatever might have been the prevalence of former doubts, since the time of Lord Holt, such a right has always been deemed a valuable franchise or privilege."

Ashby *v.* White, 2 Ld. Raym, 938, 1 Kyd on Corp. 16.

The suit is well brought by plaintiff on behalf of the members of the association.

Equity Rule 38.
Smith *v.* Swormstedt, 16 Howard, 288.

FIFTEENTH.

Decision on amendments a judicial function.

The determination of the validity of ratification of Constitutional amendments is a judicial func-

tion. There is none more important in a constitutional government like ours.

McConaughty *v.* Secretary of State, 106 Minn. 392.

At p. 401, the Court said:

"An examination of the decisions shows that the Courts have almost uniformly exercised the authority to determine the validity of the proposal, submission or ratification of Constitutional Amendments." Citing cases from Arkansas, New Jersey, Ohio, Nebraska, Idaho, Indiana, Mississippi, Wisconsin, California, Montana, Pennsylvania, Maryland and North Dakota.

In this case, after concluding its examination of the authorities, the Court said:

"The recent case of Rice *v.* Palmer, 78 Ark. 422, 440, presented the identical question which we have under consideration. In reference to the contention that the Constitution intended to delegate to the Speaker of the House of Representatives the power to determine whether an amendment had been adopted and that the question was political, and not judicial, the court observed: 'This argument has often been made in similar cases to the courts, and it is found in many dissenting opinions, but, with possibly a few exceptions, it is not found in the prevailing opinion.' * * *

"There can be little doubt that the consensus of judicial opinion is to the effect that it is the absolute duty of the judiciary to determine whether the Constitution has been amended in the manner required by the Constitution, unless a special tribunal has been created to determine the question; and even then many of the courts hold that the tribunal cannot be permitted to illegally amend the organic law. There is some authority for the view that *when the Constitution itself* creates a special

tribunal, and confides to it the exclusive power to canvass votes and declare the results, and makes the amendment a part of the Constitution as a result of such declaration by proclamation or otherwise, the action of such tribunal is final and conclusive. It may be conceded that this is true when it clearly appears that such was the intention of the people when they adopted the Constitution. The right to provide a special tribunal is not open to question; but it is very certain that the people of Minnesota have not done so."

SIXTEENTH.

Relief now asked.

In the case at bar the relief against the Secretary of State that should be granted is a mandatory injunction requiring him to issue a proclamation rescinding his former proclamation on the subject and declaring that the so-called Nineteenth Amendment, alleged in the bill, is not and has not become a part of the Constitution of the United States.

14 Ruling Case Law, 315, Section 14:

> "The power of a Court of Equity to grant a mandatory injunction is generally recognized."

In re Lennon, 166 U. S. 548, the original bill was filed to compel defendant companies to continue exchange of business with plaintiff—also a railroad Company—notwithstanding a strike.

Held that Court had jurisdiction, p. 556:

> "But it was clearly not beyond the power of a Court of Equity which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action where the circumstances of the case demand it."

In short, it is the duty of the Court to restore the plaintiff to all the rights which he has lost by reason of the erroneous judgment.

> "Where a judgment or decree of an inferior court is reversed by a final judgment in a Court of Review, a party is in general entitled to restitution of all things lost by reason of the judgment in the lower Court and accordingly the Courts will, where justice requires it, promptly and as far as practicable, place him as nearly as may be in the same condition he stood in previously."

18 Encyc. Pl. & Pr. 872, Sec. 2.
S. P. *Ex Parte Morris*, 9 Wallace, 605.
Morris v. *Cotton*, 8 Wallace, 907.
Commonwealth v. *Griest*, 196 Penn. 396, 409.

There was no doubt a time when the power of the Court to issue a mandatory injunction was questioned, but as was said by Sir George Jessel, in Smith *v.* Smith, 20 Eq. 500, the power to compel a defendant to do affirmatively an act to which the plaintiff has a right, is now well established and should be exercised with no more hesitation than the power to restrain him from doing something to the injury to the plaintiff. This is the law,

even though the acts were done after the filing of the bill.

Tucker *v.* Howard, 128 Mass. 361.
Beadel *v.* Perry, 3 Eq. 465.
2 Story Eq., 14th Ed. Sec. 1181, Note 2.

SEVENTEENTH.

The Court of Appeals affirmed the decree "On the authority of Widenman *vs.* Colby," a decision of its own, 265 Fed. 998.

The authorities cited in the opinion in that case have no application to this. They are all decisions in proceedings for mandamus, which that case was and this is not. But even in mandamus the Supreme Court of Pennsylvania held

Commonwealth *vs.* Griest, 196 Pennsylvania 396, 409,

that where owing to the delay incident to litigation the election respecting which the mandamus was first prayed for had been had, the Court would retain the proceeding and grant a mandamus applicable to the next election. It should be noted also that that suit was brought by a citizen and a taxpayer on precisely the same grounds as those on which the present suit is brought; that is to say, that his rights as a citizen and taxpayer would be affected by the constitutional amendment, the validity of which was in question, and which the relator there asked to have submitted to the vote of the people.

The decision in the Widenman case was also based upon the proposition that a proclamation

by the Secretary of State declaring the ratification of a Federal amendment was only a ministerial act. "He (the Secretary of State) was not required or authorized to investigate and determine whether or not the notices stated the truth. * * * * Moreover even if the proclamation was cancelled by order of this Court, it would not affect the validity of the amendment. Its validity does not depend in any wise upon the proclamation."

The fallacy of this argument consists in ignoring the plain fact that the proclamation is prima facie evidence of the validity of the amendment; that all citizens are bound to take notice of it and that many are acting upon the assumption that it is valid. In this consists the equity of the plaintiff's bill. The case is similar to that of a negotiable instrument fraudulently put in circulation. On its face it is valid and the maker has an equity to restrain its negotiation. Here the proclamation is good on its face and citizens affected by it have an equity to restrain its enforcement.

EIGHTEENTH.

Counsel are well aware of the impression which has been assiduously fostered by the advocates of the amendment; that it has ben adopted by general consent and that popular sentiment would not justify the action of a Court in declaring it invalid. This impression is contrary to the truth.

The bill alleges that in eight States, the legislatures of which have passed resolutions ratifying the amendment, and in West Virginia, the action

of whose legislature is in doubt, "A proposition to amend the Constitution of said states respectively so as to give to women the right to vote was submitted to the vote of the people of said States respectively at divers times during the six years last past and was in each case defeated by the vote of the people of said States respectively." (Article XVII, Record, p. 10.)

The Court is also reminded that its decision in McCulloch *vs.* Maryland, 4 Wheat. 315, was received with popular disfavor; was attacked by President Jackson, who refused to be bound by it and who vetoed the bill extending the charter of the Bank of the United States upon the ground that Congress had no constitutional power to charter a National Bank.

4 Beveridge Life of Marshall, 309-317.

The country suffered for want of such a system from 1837 to 1862. Then by universal consent the power was again exercised and the National Banking System came into being and has continued ever since. It now is regulated and made more efficient by the Federal Reserve System. Every banknote issued by a Federal Reserve Bank is a witness to the authority of this Court and to the final popular submission to its decisions. Political leaders come and go; party passion flows and ebbs, but this Court remains what it always has been—the guardian and interpreter of the system of government established by our fathers. It is just as important now to protect the right of the states to local self-government, as it was a century ago to vindicate the authority of the federal government against the encroachment by the states.

We are proud of popular government. We have frequent elections. That is a part of our system.

The one balance wheel in that system is the authority of the courts to enforce in time of excitement and popular enthusiasm the fundamental rules which were laid down in times of calmness and deliberation.

This is well stated by Mr. Justice Ramsey of the Supreme Court of Oklahoma, in

> Chicago, R. I. & P. Ry. Co. *vs.* Taylor, 192 Pacific Reporter, 349, 356.

> "In monarchies constitutions are made primarily to protect the subject from the tyranny and depotism of the crown. In democracies constitutions are made for minorities and not majorities; they are made to protect the minority from the avarice, greed, tyranny and depotism of the majority. That majority can protect itself." * * * "We trust the Constitution has not yet become a shuttlecock of public opinion, and that the despotic doctrine that 'might is right' has not and will not displace in this nation government within constitutional limitations. The police power has expanded during recent years into dangerous proportions, and it behooves us not to forget that 'eternal vigilance is the price of liberty'."

NINETEENTH.

The decree should be reversed with directions to grant a permanent injunction as prayed for against the Attorney General and a mandatory injunction directing the Secretary of State to issue a proclamation that the Amendment in question is not a part of the Constitution.

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